IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 10, 2006 Session

TANYA GILLISPIE a/n/k SEAN GILLISPIE, DECEASED v. CITY OF KNOXVILLE, TENNESSEE

Appeal from the Circuit Court for Knox County
No. 1-291-04 Dale Workman, Judge

No. E2005-01353-COA-R3-CV - FILED APRIL 18, 2006

This appeal arises out of a wrongful death action filed against the City of Knoxville under the Tennessee Governmental Tort Liability Act by Plaintiff Tanya Gillispie as next of kin of her son who was shot and killed by a police officer. Ms. Gillispie claimed that her son's death was caused by the negligence of both the officer who shot her son and that officer's assisting partner. The trial court entered judgment in favor of the City, and Plaintiff appeals upon grounds that the trial court's ruling was based solely upon its consideration of the actions of the shooting officer. Ms. Gillispie contends that the trial court committed reversible error in failing to consider whether the actions of the other officer were negligent. She also appeals the trial court's order denying her motion for new trial, arguing that a new trial before a different judge was warranted because the trial judge failed to disclose that his son is a deputy employed by the Knox County Sheriff's Department, and this fact created a reasonable question of bias. We affirm the judgment and order of the trial court upon our determination that the actions of the nonshooting officer were not the proximate cause of the death of Ms. Gillispie's son, and we affirm the trial court's order denying the motion for new trial upon our determination that Ms. Gillispie failed to submit evidence creating a reasonable question as to the trial judge's impartiality.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Cause Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

A. Philip Lomonaco, Knoxville, Tennessee, for the Appellant, Tanya Gillispie a/n/k Sean Gillispie, deceased.

Robert H. Watson and Reid A. Spaulding, Knoxville, Tennessee, for the Appellee, City of Knoxville, Tennessee.

OPINION

I. Background

This case arises out of a tragic event that occurred in the downtown area of Knoxville in the early morning hours of May 18, 2003. At approximately 3:00 a.m. on that date, an employee of the Weigel's convenience store located on Summit Hill Drive called the Police Department of the City of Knoxville and complained that there was a large, noisy crowd of persons in cars congregated in the business's parking lot. Police Department Officers David Ogle and Jason Keck responded to the call.

Because of the large number of vehicles already in the Weigel's parking lot, Officers Ogle and Keck were unable to enter the lot in their cruisers so they parked nearby, entered the lot on foot, and proceeded from one vehicle to another requesting that the lot be vacated. One of the cars in the lot was backed into a parking space near the front door of the store and was, at the time of the arrival of Officers Ogle and Keck, occupied by two individuals - Frank Mitchell, who sat in the driver's seat, and Sean Gillispie, age 20, who sat in the passenger side rear seat. Frank Mitchell's cousin, Derek Mitchell, had arrived in the same car, but left the car prior to the arrival of the police and was in another vehicle nearby.

The windows of the Mitchell/Gillispie car were partially down, and loud music was playing from inside. Officer Ogle approached the car and asked the driver, Frank Mitchell, for his identification and vehicle registration. As he did so, Officer Ogle noticed Sean Gillispie sitting in the back seat and observed that a handgun lay on the seat to the left of Mr. Gillispie. Officer Ogle testified that, although he did not ever see Mr. Gillispie pick up the gun, Mr. Gillispie "had his hand on top of the weapon in, like, a semi-grip."

When he saw the gun, Officer Ogle ordered Mr. Gillispie to "drop the gun" and "put his hands up." At this moment, Officer Keck was standing at the front of the Mitchell/Gillispie vehicle surveying the parking lot. When he heard Officer Ogle's command to "drop the gun," Officer Keck moved to Officer Ogle's position at the driver's window of the car and told Frank Mitchell to put his hands up. Frank Mitchell complied with this command. As Officer Keck was assuming the position next to the driver's window, Officer Ogle had begun moving toward his right to the rear of the vehicle with the intention of going around the vehicle's rear to the back passenger side door for the purpose of removing Mr. Gillispie from the vehicle. Officer Keck testified that at this moment both Mr. Gillispie and Frank Mitchell had their hands raised, and Mr. Gillispie had his hands at approximately shoulder height or above. Officer Keck further testified that he did not know where the gun was when he walked up to the driver's window, and Officer Ogle did not tell him where he had seen the gun or to cover either occupant. It appears that at this time, Officer Keck's attention was focused on Frank Mitchell until the latter turned toward the back seat whereupon Officer Keck's attention was directed toward Mr. Gillispie. Officer Keck then observed that Mr. Gillispie's hands were no longer raised, but were down and moving in the area of his right side

between the car seat and the door on his right side. Officer Keck's testimony in this regard and in regard to events transpiring immediately thereafter was as follows:

> A. Frank Mitchell turned, the driver turned. As he turned I looked at him for a brief second, solely at him for a moment, probably said something to him. As I looked back Officer Ogle had started toward the rear of the vehicle, and I looked at Sean Gillispie and he had his hands down to his right side.
>
> . . .
>
> I was very surprised that he had put his hands down. I knew that it was - - I knew that it was a dangerous situation at that point. I stepped to the rear of the vehicle, further to the rear, probably to the center of the driver's side rear door. I also told him to put his hands up or something to that effect. I couldn't tell you exactly what I said. I definitely said, put your hands up, at some point in there. I couldn't tell you if I started saying that before I moved to the back, or I said it as I was moving, but that's what happened.
>
> Q. And where was his hands at that time?
>
> A. His hands were still on his right side sort of at leg level or actually below, slightly below leg level, almost in the crevice that fits there, the crevice that exists there between the seat and the door. His hands were not visible.
>
> Q. Tell us what you saw next.
>
> A. He was manipulating his hands. He was moving his hands. I told him, put your hands up. For a period of time he didn't seem to acknowledge me. He didn't seem to respond to what I was saying. Again, as that - - as that went on for a brief period of time, I couldn't say how long, I knew that Officer Ogle was moving to the rear of the vehicle. And as I told him to put his hands up he refused. He didn't do it. At some point I said, put your hands up or raise your hands, something to that effect. And then he brought his hands up and he had turned toward me with the gun in his hand.
>
> Q. Okay. Did you see the weapon in his hands?
>
> A. Yes, sir.

Q. This is the KelTech nine millimeter[1] that was found in the vehicle and is listed under the three on Exhibit No. 4. Do you recognize that weapon?

A. Yes, sir.

. . .

Q. Did you fire your weapon?

A. Yes, sir.

Q. Did you fire that weapon after you saw this weapon in the hands of Sean Gillispie?

A. Yes, sir.

Q. When you went back to the window that you described a moment ago and you saw his hand on his right side, did you fire your weapon at that point in time?

A. No, sir.

Q. When was it, as he was coming around that you fired your weapon, if you recall?

A. His hands were - - his hands had come from his right side towards - - I tend to want to show with my hands, but let me try to explain it. His hands had come from his right hand side and over to his left toward me. His hands went - - and it's very hard to say exactly at what point my weapon fired. I would say his hands were past the center of his body.

. . .

Q. On this occasion when Mr. Gillispie had this nine millimeter KelTech weapon coming in your direction, did you feel that you were in danger?

A. I felt I was in imminent danger of serious bodily injury, or death, yes, sir.

---

[1]The record shows that the gun, which belonged to Frank Mitchell, was loaded at the time of the described incident.

Q. Is that why you used deadly force?

A. Yes, sir.

Officer Ogle was proceeding around the rear of the car when he heard the shot fired by Officer Keck. Officer Ogle testified that he had difficulty seeing into the car because the back window was tinted and that he began yelling for Mr. Gillispie to get out of the car, whereupon Mr. Gillispie got out of the car and onto the ground. Officer Ogle then observed that Mr. Gillispie was wounded.

Derrick Mitchell testified that, after he heard the shot, he jumped out of the car he was in, made his way to Mr. Gillispie, and knelt down next to him until pulled away by one of the officers. Mr. Mitchell further testified that Mr. Gillispie was holding a cellular phone in his hand at this time. A few minutes later, Mr. Gillispie died from the gunshot wound inflicted by Officer Keck.

In May of 2004, the appellant Tanya Gillispie, Sean Gillispie's mother, filed a complaint as next of kin against the City of Knoxville (hereinafter "the City") for wrongful death under the Tennessee Governmental Tort Liability Act. Among other things, the complaint set forth the following allegations:

> Officer Keck was negligent in the discharge of his weapon because he did not wait to see what Sean Gillispie had in his hands, which turned out to be a cellular phone.
>
> Officer Ogle was negligent by not following correct police procedures by abandoning the position of authority and control he had over both individuals and going to the rear of the vehicle.
>
> Officer Ogle's negligent action caused and allowed Sean Gillispie to believe he had time and ability to get his cell phone, and call his mother.
>
> At no time did Sean Gillispie have any weapon in his hands prior to or after being fired upon by officer Keck.
>
> The negligent action of the officers was the proximate cause of the death of Sean Gillispie.
>
> Sean Gillispie, if negligent, was less than 50% negligent in his actions as compared to the negligent actions of the two KPD officers.

The case came on for trial without a jury after which, on April 27, 2005, the trial court entered judgment in favor of the of the City, determining that Ms. Gillispie failed to prove that an

employee of the City was negligent and that such negligence caused the death of Sean Gillispie. In its accompanying findings of fact and conclusions of law, *inter alia*, the trial court noted that the only direct evidence of what occurred when Officer Ogle moved to the rear of the car containing Mr. Gillispie was the testimony of Officer Keck and that there was "no credible evidence to contradict Officer Keck's testimony that he clearly identified a gun in the hands of Sean Gillispie and fired his weapon because of the imminent threat of death or great bodily harm." The court further stated:

> Without finding whether Officer Ogle was or was not negligent under the facts of the case, the court finds that any actions of Officer Ogle were not a cause in fact of Sean Gillispie's death and therefore cannot be a basis of any recovery by the plaintiff.

After entry of the trial court's judgment, Ms. Gillispie filed a motion for new trial upon grounds that the trial court judge did not disclose that his son was employed as a law enforcement officer by the Knox County Sheriff's Department. The motion alleges that this fact was not discovered by Ms. Gillispie and her attorney until after trial, that, had this been revealed before trial, a motion for recusal would have been filed, and that "[a] reasonable person would expect that the Court could be biased in favor of law enforcement under the circumstances of this case."

Ms. Gillispie's motion for new trial was denied by order of June 2, 2005. Thereafter, Ms. Gillispie filed an appeal of that order and the trial court's final judgment.

II. Issues

The following issues are now presented for our review:

1) Did the trial court err when it ruled in favor of the City based solely upon its determination that Officer Keck was not negligent and without making any determination as to the negligence of Officer Ogle?

2) Did the trial court improperly deny Ms. Gillispie's motion for a new trial upon allegations that the trial judge failed to disclose that his son was employed as a deputy by the Knox County Sheriff's Department?

III. Standard of Review

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless there is evidence that preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. *Seals v. England/Corsair Upholstery Mfg. Co., Inc.*, 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are accorded

no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

IV. Negligence

The first issue we address is whether the trial court erred in ruling in favor of the City based solely upon its finding that Officer Keck was not negligent without regard to whether Officer Ogle was negligent.

The Tennessee Government Tort Liability Act is codified at T.C.A. § 29-20-101, *et seq.* That portion of the Act set forth at T.C.A. § 29-20-205 provides that, with certain specified exceptions, "[i]mmunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment." T.C.A. § 29-20-310 further provides as follows at subsection (a):

> The court, before holding a governmental entity liable for damages, must first determine that the employee's or employees' act or acts were negligent and the proximate cause of plaintiff's injury, that the employee or employees acted within the scope of their employment and that none of the exceptions listed in § 29-20-205 are applicable to the facts before the court.

It is not asserted that the actions of either Officer Keck or Officer Ogle were outside the scope of their employment or subject to any of the exceptions listed at T.C.A. § 29-20-205. Thus, the appropriate matter of inquiry in this case is whether the actions of either officer were negligent and the proximate cause of Mr. Gillispie's death.

In *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991), the Tennessee Supreme Court set forth the five elements of a common-law negligence action as follows:

> (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal cause.

With respect to the element of proximate or legal cause, the Court articulated a three-pronged test:

> (1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and (2) there is no rule

> or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.

Id. at 775.

Ms. Gillispie contends that Officer Ogle acted negligently when he yelled for Mr. Gillispie to "drop the gun" even though Mr. Gillispie did not have the gun in his hands when Officer Ogle left his position at the window of the Gillispie/Mitchell vehicle. In her brief, she references expert testimony presented in the case as to the alleged negligence of Officer Ogle as follows:

> At trial, the Appellant presented Frank H. Saunders, who was qualified by the Court as an expert in police training and the use of force. In his testimony, Mr. Saunders stated that, in a hypothetical situation, failure to communicate between two officers after one has sighted and given notification of the presence of a gun is "[t]otally inappropriate," especially when the sighting officer later positions himself to lose view of the weapon. Because the sighting officer is not assured that the second officer is totally aware of the circumstances, Mr. Saunders characterized this behavior as 'grossly negligent.'"

Ms. Gillispie argues as follows that this alleged negligence of Officer Ogle resulted in the death of her son:

> Because Officer Keck believed that one of the two passengers had a gun in his hands or about his person and because Officer Ogle failed to communicate to Officer Keck where the weapon was located, it was a normal response for Officer Keck to assume that Sean Gillispie's hands were manipulating a gun in the back seat. Officer Ogle did not equip Officer Keck with information to assume otherwise.

Ms. Gillispie's argument is founded upon the assertion that Officer Keck acted based upon assumptions he formed as a result of information communicated by Officer Ogle. However, the record does not indicate that Officer Keck fired his weapon because he *assumed* that Mr. Gillispie had the gun in his hands, but rather because he actually *saw* the gun in Mr. Gillispie's hands and *saw* Mr. Gillispie pointing the gun in his direction. Officer Keck's above cited testimony in this regard constitutes the only direct evidence as to what prompted him to shoot Mr. Gillispie. Officer Keck testified that he shot Mr. Gillispie because he saw Mr. Gillispie with the KelTech nine millimeter weapon in his hand and the officer believed he was in imminent danger of serious bodily injury or

death. Given Officer Keck's testimony regarding his own observations in this regard, it cannot reasonably be argued that Officer Keck would not have fired his weapon had Officer Ogle informed him that the gun was on the seat when he (Officer Ogle) saw it. It does not matter where the gun was when Officer Ogle saw it if it was in Mr. Gillispie's hands when Officer Keck saw it. The actions of Officer Ogle were not a substantial factor in bringing about Mr. Gillispie's death and, therefore, cannot have been the proximate cause of Mr. Gillispie's death. This case involved the unfortunate and untimely death of a young man. We are certainly sympathetic to Ms. Gillispie for the loss of her son. However, our review is confined to the record before us. From the record before us, we do not find that the actions of Officer Ogle were the proximate cause of Sean Gillispie's death. Accordingly, the trial court did not err in failing to make a determination as to the negligence of Officer Ogle.

V. Judicial Bias

The other issue presented for our review is whether the trial court erred in denying Ms. Gillispie's motion for a new trial upon allegations that the trial judge failed to disclose before trial that his son was an employee of the Knox County Sheriff's Department. Ms. Gillispie contends that this fact constituted a basis for questioning the trial judge's impartiality.

The decision as to whether recusal is warranted under the circumstances presented in a given case is left to the trial judge's discretion and that decision will not be reversed unless there is a clear abuse of discretion on the face of the record. *Board of Professional Responsiblity of the Supreme Court of Tennessee v. Slavin*, 145 S.W.3d 538, 546 (Tenn. 2004).

In *Davis v. Liberty Mutual Insurance Company*, 38 S.W.3d 560, 564-565 (Tenn. 2001), the Tennessee Supreme Court noted when recusal is appropriate as follows:

> A motion to recuse should be granted if the judge has any doubt as to his or her ability to preside impartially in the case. *See* [*State v. Hinds*, 919 S.W.2d 573, 578 (Tenn. 1995)] However, because perception is important, recusal is also appropriate "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). Thus, even when a judge believes that he or she can hear a case fairly and impartially, the judge should grant the motion to recuse if "the judge's impartiality might reasonably be questioned." Tenn. Sup. Ct. R. 10, Canon 3(E)(1). Hence, the test is ultimately an objective one since the appearance of bias is as injurious to the integrity of the judicial system as actual bias. *See Alley*, 882 S.W.2d at 820. ...

The record shows that Brandon Workman, the trial judge's son, has been employed as a deputy sheriff by the Knox County Sheriff's Department since June 5, 1995. Ms. Gillispie and her attorney attest that they were unaware of this fact until after trial. In her motion for new trial, Ms. Gillispie charges that " [h]aving a close family member in law enforcement would lead to bias" and that "[a] reasonable person would expect that the Court could be biased in favor of law enforcement under the circumstances of this case."

We are compelled to note that our review of the conduct of the proceedings in this case as reflected in the provided record indicates absolutely no evidence of any actual bias on the part of the trial judge nor does Ms. Gillispie allege such. While we recognize that, consistent with the language set forth in *Davis v. Liberty Mutual,* actual bias need not be shown and the appearance of bias is enough to merit recusal, we do not agree that the simple fact that the trial judge's son is employed as a sheriff's deputy is sufficient to create a reasonable question as to the judge's impartiality.

A party challenging a judge's impartiality is required to present evidence that would cause a reasonable and disinterested person to conclude that the judge's impartiality might reasonably be questioned. *Davis v. Tennessee Department of Employment Security*, 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999). We do not find that such evidence has been presented in this case. Ms. Gillispie has failed to explain why "a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." Instead, it is apparently argued that the trial judge was disqualified *per se* because his son is a deputy. We do not agree. Our decision in this regard is supported by the commentary to Tenn. Sup. Ct. R. 10, Canon 3(E)(1) which provides as follows:

> The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judges's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii)[2] may require the judges[*sic*] disqualification. ...

If the fact that a lawyer in a proceeding is affiliated with a firm with which a relative of the presiding judge is also affiliated is not of itself sufficient to disqualify the judge, we do not believe that the mere fact that a party appearing before the judge and a relative of the judge belong to the same profession would require the judge's disqualification. Although we do not find Tennessee cases addressing the specific issue, our decision is supported by law outside of this state.

In *York v. United States,* 785 A.2d 651 (D.C. Ct. App. 2001), the defendant had attended a public meeting concerning proposed federalization of the city police department. During the course

[2] Section 3E(1)(d)(iii) requires the disqualification of a judge in a proceeding.

of the meeting, the defendant took a microphone and discoursed upon his dislike of the police force. When he refused to release the microphone, a scuffle began during which the defendant punched the meeting moderator and tackled a uniformed police officer. The defendant was charged with assault. Before his trial began, the presiding judge disclosed that her husband was a police officer and that her deceased brother had once been chief of police. Defense counsel moved for the judge's recusal, stating "there is certainly an appearance of a conflict, in view of the exposure that the court has had to police officers and your familiarity with them." The motion was denied even though one of the complainants was a police officer as were two witnesses testifying on behalf of the government. The Court of Appeals for the District of Columbia affirmed this ruling. Acknowledging the applicability of the Code of Judicial Conduct for the District of Columbia and its requirement that a judge recuse himself or herself from any case in which there is "an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question [the] judge's impartiality," the Court stated as follows:

> Appellant's claim of bias rests on the bare assertion that the judge's family relationships with police officers, in and of themselves, created an appearance of judicial bias warranting recusal. While an appearance of bias resulting solely from a judge's personal relationships may require recusal in some circumstances, this is not such a case. Weighing heavily in our determination is the fact that appellant failed to establish any significant connection between the judge's husband or deceased brother and the facts, parties, or witnesses involved in this case.

Id. at 656 [Citations omitted].

We believe the inquiry called for under Canon 3(E)(1) requires more than speculation based upon suspicion. The defendant in this case is the City of Knoxville, and the employees accused of negligence are City police officers. Brandon Workman is not employed by the City of Knoxville and is not a City police officer. He is a sheriff's deputy employed by Knox County and there is no evidence that he had any special interest in the outcome of this case as a result of his employment as a sheriff's deputy or for any other reason. Accordingly, there is no evidence that Judge Workman would have had any special interest in the outcome of this case by reason of the fact that Brandon Workman is his son. Our careful review of the record does not persuade us that the trial judge abused his discretion in failing to recuse himself in this case and, therefore, denial of the motion for new trial is affirmed.

VI. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed and the case is remanded for further action consistent with this opinion. Costs on appeal are adjudged against Tanya Gillispie a/n/k Sean Gillispie, deceased.

_____

SHARON G. LEE, JUDGE